

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



HOWARD SPADE,)	
)	
Charging Party,)	Case No. S-CO-29 0
)	
v.)	PERB Decision No. 1075
)	
SAN JUAN TEACHERS ASSOCIATION,)	December 16, 1994
CTA/NEA,)	
)	
Respondent.)	
_____)	

Appearances: V. Dean Close, Jr., Attorney, for Howard Spade;
California Teachers Association by Diane Ross, Attorney, for
San Juan Teachers Association, CTA/NEA.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION AND ORDER

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Howard Spade (Spade), to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). The ALJ dismissed the complaint which alleged that the San Juan Teachers Association, CTA/NEA (Association) violated section 3543.6(b) of the Educational Employment Relations Act (EERA)¹ when it failed to take Spade's grievance to arbitration.

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all references herein are to the Government Code. Section 3543.6 states, in pertinent part:

It shall be unlawful for an employee organization to:

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

The Board has reviewed the entire record in this case, including the transcript, exhibits, proposed decision, Spade's exceptions and the Association's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.²

The complaint and unfair practice charge in Case No. S-CO-290 are hereby DISMISSED.

Chair Blair and Member Caffrey joined in this Decision.

²In March 1994, the Board denied Spade's request for oral argument.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



HOWARD SPADE,

Charging Party,

v.

SAN JUAN TEACHERS ASSOCIATION,
CTA/NEA,

Respondent.

Unfair Practice
Case No. S-CO-290

PROPOSED DECISION
(1/7/94)

Appearances: V. Dean Close, Jr., Attorney, for Howard Spade;
Diane Ross, Attorney, for San Juan Teachers Association, CTA/NEA.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On July 14, 1992, Howard Spade (Spade or Charging Party) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the San Juan Teachers Association, CTA/NEA (Association or Respondent). The charge alleged violations of subdivisions (a) and (b) of Government Code section 3543.6, a part of the Educational Employment Relations Act (Act).¹

¹The Act is codified at Government Code section 3540 et seq. All section references, unless otherwise noted, are to the Government Code. Subdivisions (a) and (b) of section 3543.6 state:

3543.6. It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

On September 29, 1992, the Charging Party filed a first amended unfair practice charge against the Association, alleging violations of the same subdivisions of section 3543.6.

On January 12, 1993 the Office of the General Counsel of PERB, pursuant to a request by Charging Party, filed a notice of partial withdrawal, effectively dismissing the allegation that the Association had violated subdivision (a) of section 3543.6.

On January 22, 1993, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint alleging a violation of subdivision (b) of section 3543.6.

On January 25, 1993, the Association answered the complaint denying all material allegations and asserting several affirmative defenses.

On February 4, 1993, an informal conference was held in an attempt to reach voluntary settlement. No settlement was reached.

The formal hearing was held on May 3 and 4, 1993, before the undersigned. Both sides filed post-hearing briefs. The last brief was filed on July 21, 1993, and at that time the case was submitted for a proposed decision.

INTRODUCTION

Howard Spade was a teacher with the San Juan Unified School District (District) from 1978 to 1991, when he was laid off in a budgetary cutback. When he was first employed he had a

because of their exercise of rights guaranteed by this chapter.

vocational credential. Due to a misreading of his collective bargaining agreement (CBA), he failed to timely submit educational transcripts which would have raised him from column I to column III on the salary schedule. He came to the Association for assistance in filing a grievance to retroactively obtain the appropriate back salary.

He believed that the Association representative, Linda Gubman (Gubman), in her attempts to help him, failed to meet the mandated duty of fair representation required of all exclusive representatives.

JURISDICTION

The parties stipulated, and it is therefore found, that the Charging Party is a public school employee and the Respondent is an employee organization and an exclusive representative within the meaning of the Act.

FINDINGS OF FACT

The Collective Bargaining Agreement

The CBA contains a certificated employee salary schedule together with explanatory provisions governing placement on the schedule. The salary schedule grants "step" credit for years of experience and "column" credit for college and university units. Although the schedule itself appears to credit units only if they are obtained after receipt of a bachelor's degree, the explanatory provisions make it clear that a vocational credential (8.0 credential), such as the one that Spade had, is to be treated as the equivalent of a bachelor's degree. Under the CBA,

units received subsequent to receipt of the 8.0 credential may be given credit on the salary schedule in the same manner as post-bachelor degree units.

However, a certificated employee may receive credit for units on the salary schedule only if he or she has filed transcripts with the District substantiating those units. To receive credit for any school year, transcripts must be filed in the personnel office by October 1 of that year. These requirements, as well as the provisions regarding treatment of the vocational credential, have been included in every CBA since at least 1978.

The District sends every teacher an annual notice informing them of their step and column placement on the salary schedule and their actual salary. These letters are very terse and describe, in an objective, analytical manner, the individual employee's status, salary and current position. It does not discuss, in any detail, the units filed by such employee with the District. A teacher is not entitled to credit on the salary schedule until his/her educational units have been filed with the District.

Spade first became aware of his alleged misplacement on the salary schedule on July 17, 1991. He had been laid off in the spring of 1991 and was applying for a job as a substitute teacher. After bringing in all of his university transcripts to the District office, he was informed by Linda Davis (Davis), personnel clerk, that he could receive "column" credit for the

units that led to his bachelor's degree. With these units added to his total, he would move over two columns on the salary-schedule.

Spade was unaware, prior to his conversation with Davis, that the CBA treated his 8.0 credential as if it were a bachelor's degree. Thus, Spade had not understood that he was entitled to salary schedule credit for his post-credential, but pre-bachelor's degree units. He originally believed that he was only entitled to credit for units earned after receipt of his bachelor's degree.²

Spade's Grievance

Spade first met with Association representative Gubman on August 12, 1991. One of her responsibilities was the processing of grievances. She had ten years of experience processing grievances prior to assuming her position with the Association.

Gubman's initial meeting with Spade lasted between thirty minutes and one hour. Spade told her that he began to work for the District in 1978 with a 8.0 credential. Subsequently, he took university units leading to a bachelor's degree, which was awarded in 1982. He then took additional units which lead to a

²Spade was hired by the District as a vocational instructor. He had recently retired after a twenty-year career in the military service. After his employment commenced he began taking courses with the objective of obtaining his bachelor's degree in vocational education. He took these courses at night and during the summer while maintaining full-time employment with the District.

master's degree, awarded in 1985.³ Spade told Gubman that he turned in both his bachelor's units and his master's units to the District in 1985, but that the District apparently lost his bachelor's units and failed to give him salary schedule credit for those units. Therefore, he claimed he had been underpaid since 1985. He admitted that he made no copies of his submission, nor did he have any other documentation of his claim. Spade's testimony was somewhat confusing as, at various times, he testified that he turned in his bachelor's units in 1982, 1983 and 1985.

Spade insists that he signed a log book when he turned in his bachelor's units. However, Gubman insists Spade never told her, at any time, about having filled out a log book when he turned in his bachelor's units. The credential unit personnel were aware of a log being used during the 1988-90 school years, but insisted there was no log used in the 1983-85 school years.

Although Gubman was unsure whether Spade had a meritorious grievance or not, she filed a grievance on his behalf at level one. The grievance was date stamped in the personnel office on August 14, 1991. Both Gubman and Spade agreed that the only issue in Spade's grievance was whether he had turned in his bachelor's units in 1985.

³In this decision, the educational units leading to the bachelor's degree are referred to as "bachelor's units." Units leading to the master's degree are referred to as "master's units."

Spade's Personnel File

Gubman and Spade agreed to meet on August 27, 1991, at 2 p.m. at the District's personnel office to review Spade's file. Gubman confirmed the meeting by letter dated August 16, 1991. Spade insisted Gubman never showed up for the meeting and that he went through his file by himself. Gubman stated that she attended the meeting and that she and Spade inspected his personnel file. She produced notes she took while reviewing his file. The notes are dated August 27. She received a copy of all of the transcripts that were in Spade's file. Spade later called the personnel office to find out if Gubman had independently examined his personnel file. He was told that she was not permitted to do that. She had to have his permission to view the file. As more fully described below, it is found that Gubman met Spade on August 27 and examined his personnel file with him.

The District has an envelope inside each personnel file in which copies of transcripts and credentials are kept. This envelope also contains a card on which submitted transcripts are recorded. When transcripts are received, an entry is made on the card and the transcripts are placed in the envelope. Neither the card nor the envelope in Spade's file reflected the submission of his bachelor's units in 1982, 1983 or 1985. His Master's unit submission in 1985 (along with a number of in-service units) were reflected on both the card and the envelope. Gubman found nothing in Spade's file to substantiate his claim that he had turned in his bachelor's unit transcripts in 1985.

Spade's personnel file also contained copies of the District's annual letters informing him of both his salary, and step and column placement on the salary schedule for each school year from 1978-79 through 1990-91.

Spade's Grievance - Levels One and Two

A level one grievance hearing was set for August 30, 1991. Gubman informed Spade of the date of this hearing by letter dated August 16, 1991. The meeting was attended by Gubman, Spade and District representative Errol Belt (Belt). Before the meeting started, Gubman verified with Spade that he was claiming that he submitted all of his units in 1985. She then asked if he would agree to her changing the grievance to state that he had been misplaced since 1985 (rather than 1978, which was his date of hire, as the grievance originally stated.) Spade agreed and Gubman changed the date at that time. At the formal hearing, Spade denied that the change of the operative date from 1978 to 1985 was ever discussed at any grievance meeting and that he has no knowledge of how this occurred. However, his claim, even at the PERB formal hearing, was that he had been underpaid from the 1985-86 school year through that of 1990-91. As more fully discussed below, it is found that Spade agreed to this change in the grievance's operative date from 1978 to 1985.

At the level one hearing, Gubman described Spade's claim and gave him an opportunity to add anything he wished. She said he repeated his story, and added an allegation that Esther Brown (Brown), personnel clerk, would recall his submission of the

bachelor's units. Spade insisted that at this grievance meeting no one asked him any questions and that he just "sat and listened." Later, on cross-examination, he admitted he "may have contributed some, but not very much." In response to Spade's comments about Brown, Belt called her into the meeting and she stated that she remembered his coming into the office and filing some units but she had no recollection of those units including his bachelor's units. Spade had no recollection of Brown having even attended this meeting. At the conclusion of the meeting, Gubman described to Spade the next grievance step. She also told him she was concerned about the lack of any evidence in his personnel file of a 1985 submission of his bachelor's units.

Spade's level one grievance was denied on the ground that the District had no evidence of having received copies of Spade's bachelor's units prior to July 1991.

Following receipt of the level one denial, Spade's grievance was filed at level two. Before the level two hearing, Gubman had a conversation with Brown to see if she could remember any more details about Spade's submission of his units. Brown was not able to recall anything further. Later Spade asked Brown if Gubman had ever come to her to ask if she remembered anything more about his transcript submissions. Spade said Brown told him that Gubman had not come to her to discuss this matter. As more fully described below, it is found that Gubman did discuss the matter with Brown.

Gubman also talked to Linda Landreth (Landreth), supervisor of the certificated (employee) processing unit, regarding procedures in her unit. She asked if there was any other procedural documentation of the submission of units besides the cards and transcripts in the employees' personnel files. Landreth said that she was unaware of any other such records or documentation.

Spade insisted he had no contact with Gubman between the first level meeting on August 16 and the second level meeting on September 30, 1991, and that she was late for the second meeting.

Present at the level two hearing were Spade, Gubman, Mike Roberts (Roberts), the then District director of certificated personnel, Merle Padilla, the person who would have been Spade's supervisor had he been hired as a substitute, and, for a short period of time, Landreth. Gubman presented Spade's case and responded to Roberts' questions. Roberts asked Landreth about the current status of Spade's units and she confirmed that he had received credit for all the units he had brought in.

Roberts denied the level two grievance on both procedural and substantive grounds. On the issue of procedure, Roberts found that the grievance was untimely since the alleged event occasioning the grievance occurred in 1982. Roberts also found the grievance was untimely using Spade's "awareness" date of July 17, 1991.⁴ Roberts admitted, however, when he testified at the

⁴Roberts testified that he makes it "a practice to say it [the grievance] wasn't filed in a timely manner" whenever he denies a grievance. He explained this practice by stating that

formal hearing that the latter determination was in error since the grievance had been filed on August 14, 1991, 20 work days after July 17. Roberts had based his Untimeliness determination on the "delivery date", August 15, 1991 that had been incorrectly typed in the upper right hand corner of the grievance.

With regard to the substantive issue, the grievance was denied because there was no record of the bachelor's units having been submitted to the District prior to July 17, 1991, and because the District had furnished the grievant with an annual notice, from 1978 through 1991, explaining his step and column placement on the salary schedule.

Following the level two hearing, Gubman had a lengthy discussion with Spade on the telephone. Spade focused entirely on the issue of timeliness. Spade admitted, at the formal hearing, that after receiving the level two decision, he put "all of his effort" on the issue of timeliness. Gubman informed him that the grievance had been timely filed on August 14, and that even if the grievance had not been timely filed, this would not be a basis for refusing to take his case to arbitration. She also explained to him why she felt his case had insufficient merit.

Spade claimed that it was in this conversation, that Gubman told him that she was not going to speak with him any more and would only communicate with him in writing. Gubman denied making

he never knows "when an arbitrator will agree with me."

such a statement. Spade admitted that Gubman continued to speak to him after this conversation.

Following receipt of the level two denial, Gubman filed a request to take the grievance to arbitration. These requests are routinely filed so as to avoid violating the timelines for requesting arbitration. Spade admitted that Gubman did not tell him that the Association would actually take his case to arbitration.

The Association's Executive Director Yale Wishnick (Wishnick) admitted that grievances are filed for a number of different reasons. Sometimes they are filed for no more reasons than to see if they can get some sort of settlement for the individual grievant. However, the decision to take a grievance to arbitration is based on an entirely different set of criteria. The most important of these criteria is the possibility of winning.

Settlement Offer

Before the Association's grievance committee made a recommendation as to whether or not to take the case to arbitration, Gubman pursued settlement possibilities with the District. Since Roberts had no authority to make any settlement offer, she asked him if he would mind if she discussed the matter with the District's Superintendent, Dr. Jeffers (Jeffers). He did not have any problem with this. When she spoke to Jeffers he agreed to offer Spade \$1,000 or, in the alternative, to attempt to obtain an emergency credential for Spade so that he could be

given a teaching position for the upcoming year. As Spade's program had been abolished and he had such a limited credential, he was not qualified for any existing position in the District at that time. The District had no obligation to provide him a position for which he was not appropriately credentialed, nor any obligation to attempt to obtain an emergency credential for him. The offer was made solely in an attempt to settle the grievance.

Gubman had not yet communicated the District's offer to Spade when she ran into him in a District office hallway in early December 1991. In the ensuing conversation, she described the offer to him. Spade told Gubman that if there was a position in the District that he was qualified for, it was her job to see that he got it. He asked Gubman to find out what the position was. He testified that she never got back to him, and that he had no further contact with her concerning the position.

Gubman admitted that Spade, in this hallway meeting, asked her to find out what the position would be. However, before she could proceed with this effort, Spade called her and left a message that he was not interested in the settlement offer. When Gubman phoned Spade he was adamant that he did not want to accept the job offer or the \$1,000 settlement and was very interested in going forward to arbitration. Spade explained that he wanted the full back pay to which he believed he was entitled to open his own business. Spade denies that he ever spoke again to Gubman about the potential position after he asked her to find out more

about it. As more fully discussed below, it is found that Spade called Gubman to direct her not to pursue the settlement offer.

Spade did not accept the settlement offer because he believed that he was already entitled to the position, independent of the grievance, and he believed he should not have to give up his claim to back pay to receive it. Gubman explained that he had no entitlement to any position and that it was only offered as a settlement of his grievance. She also explained that she would be recommending to the Association's grievance committee that the case not be taken to arbitration.

Decision Not to Go to Arbitration

Spade knew that the Association's grievance committee would make the initial determination whether the case would proceed to arbitration. He was informed in advance of its meeting. The grievance committee met and recommended to the Association's Executive Board that Spade's grievance not be taken to arbitration. Gubman phoned Spade and told him of this recommendation. The grievance committee also sent Spade a letter telling him of its decision. It suggested he more fully explore Jeffers' settlement offer.

Again Spade wanted to talk about the timeliness issue and he indicated that this had to be the reason that Gubman had decided his case was not meritorious. Gubman explained again that the grievance had been filed in a timely manner and that even if it had not been timely, this would not be a valid reason not to proceed to arbitration. She explained that this was so as there

are many ways to get around claims of Untimeliness when the case is before an arbitrator. Gubman told Spade that the committee's decision was based on the merits of the case. She once again reviewed the merits of the case, in detail. Spade refused to believe that timeliness was not the reason for the decision not to go to arbitration.

On December 9, 1991, Gubman sent Spade a letter confirming the grievance committee's recommendation that his grievance not be taken to arbitration. The letter explained that this decision was based on (1) the lack of documentation, and (2) the fact that so much time had passed before Spade came forward with his claim. Gubman also encouraged Spade to reconsider the District's settlement offer. Finally, the letter explained that the Association's Executive Board would review the grievance committee's recommendation and that if Spade did not agree with the Executive Board's decision, he would be given an opportunity to appeal the decision, in person, at a future meeting.

After the winter break, and shortly before the Association's Executive Board met to consider the grievance committee's recommendation, Gubman again discussed the District's settlement offer with Spade. She insisted he was still adamant in rejecting the offer.

The Executive Board met on January 7, 1992. Gubman prepared a packet of information with all of the relevant documents from Spade's grievance. She reviewed the facts, the grievance team's recommendation, the settlement offer, Spade's position on the

settlement offer and his desire to go to arbitration. She consulted, at length, with the Association's attorney and her supervisor, Wishnick. Although she mentioned his concern about timeliness, she stated that this was not an issue and her discussion centered on the merits of the case. The Executive Board asked questions and discussed the case for approximately an hour and a half. It eventually decided to affirm the grievance committee's recommendation. On January 8, 1992, Gubman communicated the Executive Board's decision to Spade.

Spade had a telephone conversation following the Executive Board's meeting in which he insists Gubman told him once again she would no longer talk to him. Gubman denied making such a statement. Spade insists that this is the second time that Gubman told him that she would refuse to speak to him. However, even Spade admits that after the first alleged incident, Gubman continued to speak directly to him. This second alleged statement was made near the end of their contacts and there was little reason for Gubman to have future communications with Spade.

It is found that even if Gubman made the statements, and as more fully described below that is questionable, the incident was fairly minor and did not materially affect the level of representation provided by the Association to Spade.

Spade talked to Gubman's immediate supervisor, Wishnick, to complain of her representation. He insisted that the issues were not being properly communicated to the District. Wishnick agreed

that they spoke regarding Spade's concerns about Gubman. Spade received no satisfaction from Wishnick regarding his request to either replace Gubman as his representative or to greatly improve her representation of him.

Independent of Spade's communication, Gubman admitted to Wishnick that she was having difficulty with Spade regarding getting him to accept either her counsel or the information that she had been collecting and researching.

Pursuant to the Association's internal procedure, Spade was given the opportunity to appeal the Executive Board's decision in a personal meeting with the board. Gubman informed Spade, in a telephone conversation, that he had the right to bring a representative. Spade and his representative made a presentation to the board. He claimed that the District's acknowledgement of their error regarding his 33-1/2 master's units was proof that he had submitted his bachelor's units in 1985.

Gubman explained to the board that at one time the District had incorrectly counted Spade's master's units and shortly thereafter had corrected the miscount. The document that Spade had presented merely reflected this confusion over his master's units and had nothing to do with his claim that he had submitted his bachelor's units.⁵

⁵Spade's personnel file contained a memo dated October 12, 1984, stating that he would have to be moved from column III to column II since his file contained only 29 units, one short of the 30 required for column III. This was corrected five days later when the District verified that his file contained sufficient units for column III. These 30+ units were the result of various computer inservice classes, District-sponsored

After the presentation, the Executive Board discussed Spade's grievance at length and voted once again not to take the case to arbitration. It did so, because it felt the case was insufficiently meritorious. Gubman communicated the board's decision to Spade by letter dated February 5, 1992.

Spade's Discussion with Linda Page

Shortly after Spade received the denial of his appeal, he saw Linda Page (Page), an Executive Board member, at the Casa Robles High School library, where he was substituting. Spade insisted that Page told him, "I think I can speak for the board. We all feel you're right. We hope you get an attorney and I hope you win." Page denied making these statements. She admitted meeting and speaking to him. However, she stated that she told him that she was sorry about the fact that he had not received the pay to which he believed he was entitled. Spade then told her that he believed that Gubman had lied to him and that he believed Gubman was a "dangerous person." She also said that Spade told her in a later conversation that Gubman was "against him and lying to him and that she should not be part of our Association, and that everybody had to watch out for her."

A short time later Spade came into Page's classroom while there were students present and immediately launched into a discussion of his case. He insisted that she had agreed with him that Gubman had lied to him. Page told Spade that she never said

conferences and courses he took when he was first employed. He referred to these last courses as having been given by a "consortium."

such a thing and that she had only stated that she felt badly about his situation and had not agreed anything improper had been done. Spade told her that he intended to have her testify at some sort of future proceeding.

Page explained she voted against taking Spade's grievance to arbitration as she believed the case was weak, due in part, to the long period of time between the time he earned the units in question and the filing of the grievance. During this time he received annual notifications of his salary placement. In addition, she continued, there was no empirical evidence to prove his allegation that his bachelor's units had been filed in 1985.

Although Spade's discussions with Page are not directly relevant to the issue of whether the Association met its duty of fair representation, it helps to explain why Spade believed so strongly that his case had merit.

Credibility determination between Spade, Gubman and Page

Howard Spade is obviously a man of intelligence with a tremendous amount of drive and initiative. After he retired from military service he was determined to get a formal education and he did just that. He did it in the most difficult manner possible, as an adult, at night, and while maintaining a full-time job and meeting his responsibilities to his family.

However, despite this intelligence and drive, with regard to the crucial issues at the formal hearing, Spade displayed a lot of confusion and critical memory lapses regarding pertinent information. The lapses in memory were not all clearly defined,

nor did they all reflect an attempt to bolster his own case. Some just displayed an inability to remember specific events. For example:

a. He testified at various times that he filed his bachelor's units in 1982, 1983 and 1985.

b. He forgot, until it came up in the formal hearing, that he filled out a log book when he submitted his bachelor's units, although the employees in that unit insist they had no log book in 1985.

c. He insists that Gubman never met him to jointly examine his personnel file, and yet she has notes from such examination. As she was not permitted to examine the file without his approval, she must have attended the meeting with him to know what was in his personnel file.

d. Spade originally insisted that he "just sat and listened" to the first level grievance meeting. Later he admitted he may have "contributed some, but not very much." However, Certification Unit Employee Esther Brown was brought to the meeting in direct response to Spade's insistence that she would remember his filing his bachelor's units. He obviously contributed considerably more than he remembered.

e. He also failed to remember that Brown even attended that meeting.

f. Spade insisted that Gubman never got back to him with regard to specifics concerning the potential job offer from the District. He denies ever stating that he did not want her to

explore the job offer, that he preferred a back pay cash settlement so as to pursue other business opportunities. And yet, there is no reason Gubman would go to the trouble of negotiating a settlement on Spade's behalf and then not follow up on the offer, unless she was thwarted by Spade's disinterest.

g. Gubman insisted that Executive Board Member Page told him, "I think I can speak for the board. We all feel you're right. We hope you get an attorney and I hope you win." She denies making this statement. It is illogical for her to have made this statement within days of the board having upheld the grievance committee's decision to deny arbitration.

h. Spade persisted in believing that Page told him that she and the other Executive Board members supported his cause even after she denied making such statements during a confrontation with her in her own classroom at a time when students were present.

Spade's testimony is in direct conflict with that of both Gubman and Page, as well as logic. Therefore, it must be determined that the testimony of Gubman and Page is more credible than that of Spade.

ISSUES

Did the Association process Spade's grievance improperly to the extent that it failed to meet its duty of fair representation, thereby violating subdivision (b) of section 3543.6?

CONCLUSIONS OF LAW

Standard for Duty of Fair Representation

In order to prove a violation of the duty of fair representation, the charging party must show that the employee organization's conduct was arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (1980) PERB Decision No. 124 (Rocklin), citing precedent set by the National Labor Relations Board and affirmed by the U.S. Supreme Court in Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].)

The Board in Rocklin, affirmed this concept as set forth in Griffin v. United Auto Workers (4th Cir. 1972) 469 F.2d 181 [81 LRRM 2485], as follows:

A union must conform its behavior to each of these standards. First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action. The repeated references in Vaca to "arbitrary" union conduct reflected a calculated broadening of the fair representation standard. [Citations] Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

Allegations Set Forth in the Complaint

The complaint alleges that the Respondent violated the Act when it did the following: (1) failed to file the grievance in a

timely manner, (2) changed the date for requested back pay-
without informing Charging Party, (3) refused to answer Spade's
questions regarding the timeliness of his grievance, and (4)
informed Charging Party that she (Gubman) would no longer
communicate with him verbally. In addition, much of the evidence
at the formal hearing attacked the Association's decision not to
take Spade's grievance to arbitration. Each of these allegations
will be examined, in turn.

1. Failure to file grievance in a timely manner.

The only piece of evidence that Spade has to support his
allegation that the grievance was untimely filed was the
statement by Mike Roberts in his second level response, that the
grievance "wasn't filed in a timely manner." At the hearing
Roberts admitted that he added this only because he makes it a
practice to insert this statement into every grievance he denies.
He admitted an arbitrator would determine the grievance was filed
in a timely manner.

Gubman told Spade that there was no problem with timeliness.
He did not believe her. A simple mathematical computation should
have shown him that the document was filed August 14, 1991, which
was within 20 work days of July 17, the date he learned of the
problem.

The Association did not violate its duty of fair
representation with regard to the time Spade's grievance was
filed.

2. Changed back pay date without informing Spade.

Gubman stated that she changed this date from 1978 to 1985 while she was waiting for the first level grievance meeting to commence. She did so after asking Spade, who was with her at the time, if he was still maintaining that he first filed his bachelor's units with the District in 1985. He does not remember that conversation and contends that he has no idea when the date was changed. This was only one of many conflicts in the testimony between Spade and Gubman.

As the conflict between Spade and Gubman has been resolved in favor of crediting Gubman's testimony, a conclusion follows that the Association did not violate its duty of fair representation with regard to the changed back pay date.

3. Refused to answer Spade's questions regarding timeliness.

The evidence supports a conclusion that there was no refusal to answer questions, Spade just did not believe Gubman's insistence that there was no timeliness problem. (See No. 1, supra.) This alleged refusal does not support a conclusion that the Association violated its duty of fair representation.

4. Gubman told Spade she would no longer speak to him.

Once again the testimony of Gubman and Spade is in direct conflict. According to Spade, Gubman twice told him she would no longer speak directly to him and that all future communications had to be in writing. Gubman denied making such statements.

As the conflict between Spade and Gubman has been resolved in favor of crediting Gubman's testimony, it is concluded that the Association did not violate its duty of fair representation with regard to Gubman allegedly telling Spade that she would no longer speak to him.

5. Association's decision not to go to arbitration.

There is absolutely no evidence to show that the Association based its decision not to take Spade's grievance to arbitration on anything but the merits of the case. The evidence supporting the grievance was too weak to expect anything but a perfunctory denial from an arbitrator. Spade's grievance was based on the concept that he turned his bachelor's units in 1985 and the District lost them. However, according to his own testimony, he also turned in his master's units at the same time and the District did not lose them. He insisted that he filled out a log and there was no log. Spade insisted that Esther Brown would remember him turning in the subject units and there was evidence that she was not able to substantiate this submission. There was no evidence that the District did anything other than follow its normal routine with regard to Spade's submission(s). In short, he had absolutely no evidence, other than his own assertions, that he submitted these units in 1985.

It is hardly surprising that the Association declined to take the case to arbitration. Gubman discussed the case with Wishnick as well as the Association's legal counsel. The matter was then turned over to two membership committees, each of which

exercised its independent discretion. The Association has limited resources and they must be used in those areas that have the best possibility of success. The Association's two labor relations experts, legal counsel and two membership committees all agreed that this was not one of those areas. There was absolutely no evidence to suggest that any of these independent decisionmakers, with the possible exception of Gubman, harbored any negative feelings towards Spade.

In Sacramento City Teachers Association (1984) PERB Decision No. 428, the Board was faced with a similar circumstance. It, in pertinent part, stated as follows:

The Association's major reasons for refusing to pursue arbitration . . . were that the potential success at arbitration was doubtful and that there were potential negative implications for other bargaining unit members. Whether or not this judgment by the Association was correct is not at issue. Our inquiry focuses on whether the Association's judgment had a rational basis, or was reached for reasons that were arbitrary or based upon invidious discrimination. At no time did Charging Parties allege facts which tend to show that the decision reached by the Association was based upon any of these unlawful motives. Therefore, PERB will not stand in judgment as to the relative merits of the decision made by the Association when it refused to take the grievance to arbitration.

In this case, as in Sacramento City Teachers Association, Charging Party did not allege facts or present convincing evidence that showed that the decision reached by the Association was arbitrary, discriminatory or in bad faith.

It is therefore determined that the Association did not violate its duty of fair representation with regard to its decision not to take Spade's grievance to arbitration.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record of this case, it is found that the San Juan Teachers Association, CTA/NEA, did not violate Government Code section 3543.6(b) of the Educational Employment Relations Act. It is ORDERED that all aspects of the charge and complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party filed a statement of exceptions with the Board itself at the headquarters office in Sacramento within twenty days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing. . . or when sent by telegraph or certified or Express United states mail, postmarked no later than the last day set for filing. . ." (See Cal. Code of Regs., tit. 8, sec. 32315; Code Civ. Proc., sec. 1013.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon

each party to this proceeding. Proof of service shall accompany each copy served on a party or filed by the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32410.)

ALLEN R. LINK)
Adm Administrative Law Judge